No. 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

ALEXANDER TCHEREPNIN, et al.,
Petitioners,

vs.

JOSEPH E. KNIGHT, et al.,
Respondents.

BRIEF FOR RESPONDENTS CITY SAVINGS ASSOCIATION, DENNIS KIRBY, ET AL., LIQUIDATORS

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BRIEF FOR RESPONDENTS CITY SAVINGS ASSOCIATION, DENNIS KIRBY, ET AL., LIQUIDATORS

QUESTION PRESENTED

Is a withdrawable capital account in an Illinois-chartered savings and loan association a "security" within the meaning of that term as it is used in the Securities Exchange Act of 1934?

STATEMENT OF THE CASE.

Petitioners devote two pages (Pet. Br. pp. 12-13) to allegations and charges of fraud and concealment committed by certain of the respondents. These allegations and charges have no relevance on this appeal. No issue is presented concerning the truth or falsity of any of the charges in the complaint. This appeal concerns only the correctness of the legal determination by the Court of Appeals that a withdrawable savings account in a savings and loan association is not a "security" within the meaning of the Securities and Exchange Act of 1934.

1. Nature of the Case and the Parties Involved.

This action is brought by certain holders of withdrawable capital accounts in the City Savings Association pursuant to Sections 10(b) and 29(b) of the Securities Exchange Act of 1934. 15 U.S.C. §§78j(b), 78cc (b) (1965). They have brought this action both on their own behalf and as a class action on behalf of all persons who opened withdrawable savings accounts between July 24, 1959, and June 26, 1964 (R. 2-5, 12) to rescind their opening of withdrawable accounts in City Savings. The Respondents here and defendants-appellants below are City Savings Association, its officers, directors, and certain officials of the State of Illinois. The association is now in the process of voluntary liquidation pursuant to a plan approved by its shareholders on July 28, 1964. The shareholders elected the respondents Louis Kwasman, Harry Hartman, and Dennis Kirby as liquidators to carry out the plan which was approved by the Department of Financial Institutions of Illinois as evidenced by a certificate filed with the Cook County Recorder of Deeds on August 7, 1964, the effective date of the plan.

When the complaint in this action was filed in the District Court, City Savings Association was in the custody of the respondent Joseph E. Knight, then Director of Financial Institutions of the State of Illinois. He had assumed custody on June 26, 1964, under authority granted to him by Section 848 Illinois Savings and Loan Act. (*Ill. Rev. Stats.* ch. 32, §848 (1963). The respondent Justin Hulman was the Supervisor of the Savings and Loan Division of the Department of Financial Institutions.

Respondents, therefore, are mere *stakeholders;* they have no personal, financial interest in the outcome of this litigation. Petitioners, who admit that they are suing only on behalf of those persons who opened withdrawable savings accounts in City Savings after July 24, 1959 (Pet. Br. p. 4), are maintaining this action for only one purpose: in order to obtain a *priority* to the assets of City Savings Association.

Petitioner states that City Savings Association was granted under Illinois law "all general powers of a business corporation under the Illinois Business Corporation Act" (Pet. Br. p. 4). This is untrue. Under Illinois law a state chartered savings and loan association such as City Savings is controlled by the Illinois Savings and Loan Act. *Ill. Rev. Stats.* ch. 32, §§701-944 (1965). Section 708 of this Act provides that such an association has only those powers conferred on a corporation by the Business Corporation act that are reasonably incident to the accomplishment of the express powers conferred upon the association by the Illinois Savings and Loan Act. (*Ill. Rev. Stats.* ch. §708 (1965)).

2. Withdrawability of Capital Accounts.

Petitioners state that withdrawable savings accounts are by statute conditionally withdrawable and that they must be so "of necessity." (Pet. Br. p. 7.) They neglect to point out, however, that during the period petitioners had accounts in City Savings and until 1965, Illinois law provided that any amounts deposited after a condition as to withdrawability had been put into effect *must be fully withdrawable. Ill. Rev. Stats.* Ch. 32, §773h (1963). City Savings Association did limit the amount which certain of its depositors could withdraw, and all of the petitioners opened their accounts *after* these limitations were put into effect. Thus none of the accounts of the petitioners were or could have been limited as to withdrawability.

3. Investment Powers of City Savings Association.

Petitioners have inaccurately stated the investment power of City Savings under Illinois law. They state that the management of an Illinois savings and loan association can invest capital "virtually without limitation." (Pet. Br. p. 10.)

On the contrary, Illinois law provides in great detail on what bases an association may loan funds to members. Loans may only be made on the security of withdrawable capital or of real estate. *Ill. Rev. Stats.* Ch. 32, §791 (a), (b) (1965). If the security is real estate, Illinois law specifies restrictions to ensure that the security will be both good and adequate. *Ill. Rev. Stats.* Ch. 32, §791 (b) (1)-(b) (5) (1965).

4. Respondents' Motion to Dismiss.

After briefs were filed by the parties, respondents' motion to dismiss the complaint was denied by the District Court on January 17, 1966 (R. 17). Petitioners filed their answer on February 3, 1966 (R. 17-29).

5. Petitioners' Motion for the Appointment of a Receiver.

Thereafter, petitioners moved for the appointment of a receiver of the assets of City Savings Association. After the question had been exhaustively briefed by the parties, including the SEC, the Court, on March 22, 1966, entered its order denying petitioners' motion for the appointment of a receiver (R. 29-33). In this order, the Court included the required certificate authorizing a petition for an interlocutory appeal under Section 1292(b) (R. 31). The District Court certified that its order holding that withdrawable capital shares in a savings and loan association are securities within the meaning of the Securities Exchange Act "... involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." (R. 32.) Respondents did not seek leave to appeal from the order denying their request for the appointment of a receiver.

6. Opinion of the Court of Appeals.

Respondents' petition for leave to appeal was granted by the United States Court of Appeals for the Seventh Circuit on April 25, 1966. On January 20, 1967, after extensive briefs were filed by the parties and after oral argument, the Court of Appeals reversed the order of the District Court denying respondents' motion to dismiss (R. 43-64). Petition for a writ of certiorari was filed on April 20, 1967, and was granted on June 5, 1967 (R. 66).

SUMMARY OF ARGUMENT.

The holding of the Court of Appeals that a withdrawable capital account of an Illinois-chartered savings and loan association is not a "security" under the Securities Exchange Act of 1934 was correct. Both the language and the legislative history of the 1934 Act show that a withdrawable capital account in a savings and loan association is not a "security" under that Act. The term "security" was meant to apply to negotiable shares for which a more or less fluctuating market exists. Withdrawable capital accounts are, on the other hand, non-negotiable, fully matured at issue, fully withdrawable, and not subject to a fluctuating market.

The exemption of state savings and loan associations from the provisions of the Federal Bankruptcy Act, as well as the 1966 Amendments to the Federal Savings and Loan Insurance Corporation Act, which carefully preserve the role of the states in regulating local financial institutions, show the intent of Congress to limit federal regulation of state savings and loan associations. Congress has vested sufficient federal regulation of these associations in the Federal Home Loan Bank Board, and the imposition of SEC regulation over their activities by judicial fiat would produce a meaningless clash of regulatory orders and actions. Moreover, the SEC has not historically considered withdrawable capital accounts in savings and loan associations "securities" under the 1934 Act.

No case in this or any other jurisdiction has dealt with the issue presented by this case. The prior decisions of this Court, however, compel the conclusion that a withdrawable capital account is not a "security." Prior court decisions indicate that to be a "security" under the 1934 Act, an interest must involve (1) an investment of money in a

common enterprise (2) a fluctuating value, and (3) profits to come solely from the efforts of others. Withdrawable savings accounts do not involve an "investment of money" but rather involve a debtor-creditor relationship. The value of withdrawable savings accounts does not significantly fluctuate. Moreover, the profits accruing to a withdrawable savings account in a savings and loan association do not come "solely from the efforts of others." Instead, the profits come almost solely from the activities of the members among themselves, since both depositors and borrowers must be members of the association.

In addition, a holding that withdrawable savings accounts are securities would secure for petitioners a preference to the assets of City Savings Association and would discriminate against other holders of withdrawable capital accounts in the association. The basic unfairness of such a result further compels the conclusion that a withdrawable capital account is not a "security."

ARGUMENT

I.

CONGRESS DID NOT INTEND SAVINGS AND LOAN WITHDRAWABLE CAPITAL ACCOUNTS TO BE COVERED BY THE SECURITIES EXCHANGE ACT OF 1934.

Petitioners, by bringing this action, seek to rescind and have declared void their deposits in withdrawable capital accounts of City Savings and Loan Association, an Illinois chartered savings and loan association. By alleging that their deposits were solicited in violation of Section 10(b) of the 1934 Act and Rule 10 B-5 of the SEC, petitioners are trying to secure a *preference* for themselves as to the assets of City Savings and Loan Association.

The Act and the SEC rule apply, however, only to the purchase or sale of a "security." The question whether there has been any violation of the Act or of the SEC rule depends, therefore, upon whether the withdrawable capital accounts of City Savings Association are "securities."

The Act contains its own definition of the term "security." Because no case has considered whether a withdrawable capital account in a state-chartered savings and loan association is a security, that question must be answered by a reading of the statutory definition, together with other expressions of Congressional intent.

A. Withdrawable Capital Accounts Are Neither "Stock", Nor a "Certificate of Interest in a Profit Sharing Agreement", Nor a "Transferable Share", Nor an "Investment Contract".

1. Withdrawable Accounts are Not "Stock."

In concluding that withdrawable capital accounts are "stock," petitioners cite several provisions of the Illinois Savings and Loan Act to show that withdrawable capital accounts have characteristics similar to those of stock (Pet. Br. pp. 17-18). Petitioner does not mention, however, the many characteristics of such withdrawable accounts under Illinois law which distinguish them from "stock." These characteristics may be summarized as follows:

1. Withdrawable capital accounts may be issued in unlimited amounts. *Ill. Rev. Stat.*, ch. 32, §728 (5) (1965). By comparison, permanent reserve shares must have a par value and a limitation upon the amount which can be issued. *Ill. Rev. Stat.*, ch. 32, §728 (6) (1965).

2. Withdrawable capital accounts are not subject to the securities article of the Uniform Commercial Code. *Ill. Rev. Stat.*, ch. 32 §768 (c) (1965).

3. Withdrawable capital accounts are not negotiable and may be transferred only by assignment. *Ill. Rev. Stat*,. ch. 32, §768 (b), (c) (1965).

4. Withdrawable capital accounts are subject to forced redemption and retirement at any time upon the call of the Board of Directors. *Ill. Rev. Stat.*, ch. 32 §775(a) (1965).

5. Withdrawable capital accounts are fully matured and completely withdrawable at the time they are issued. *Ill. Rev. Stat.*, ch. 32 §§762(a) and 773(a) (1965). Permanent

reserve shares, of course, are not withdrawable. *Ill Rev. Stat.*, ch. 32, §763(a) (1965).

6. Withdrawable capital accounts have no preemptive rights.

7. Withdrawable capital accounts are evidenced by a certificate or account book. *Ill. Rev. Stat.*, ch. 32, §768(a) (1965).

8. Holders of withdrawable capital accounts are not entitled to inspect the general books and records of the association. *Ill. Rev. Stat.*, ch. 32, §748 (1965).

9. No annual or other report is furnished to depositors, although an annual report must be published in at least one newspaper. *Ill. Rev. Stat.*, ch. 32, §844 (c) (1965).

Thus withdrawable capital accounts have an overwhelming number of characteristics that distinguish them from "stock." On the contrary, these interests are most closely akin to the characteristics of the familiar savings bank deposit. The holder of a withdrawable account has made a deposit of money in the savings and loan association and the amount of his deposit is recorded in his savings book.

Whenever the question of whether withdrawable savings accounts are "stock" has been directly considered, a distinction between these two concepts has been recognized. For example, Prather in *Savings Accounts* (1959) at p. 38 states:

> "Throughout the United States it has been held that ownership of accounts in savings associations constitutes not the ownership of 'shares of stock' but a relationship unique unto itself, a relationship more nearly comparable to that established between a bank and its depositor. The relationship is a contractual right, enforceable by law, to have the money

> which has been placed in the association repaid to the saver according to the terms of the savings contract."

Many cases have expressly recognized that withdrawable savings accounts are not the same as corporate stock. See *In re Krueger's Estate,* 180 Wash. 165, 39 P.2d 381, 383 (1934) ("While the members were technically stockholders in common acceptations these savings were deposits rather than investments in corporate stock."); *Bell* v. *Bakerstown Savings Association,* 385 Pa. 158, 122 A.2d 411, 413 (1956) ("The savings account is analogous to a bank account."); *Rummens* v. *Home Savings Association,* 182 Wash. 539, 47 P.2d 845, 846 (1935) ("While the members of savings and loan associations may sometimes be referred to as stockholders, they are depositors rather than investors in corporate stock."); *In re Mulkins and Crawford Electric Co.,* 145 F. Supp. 146, 147 (S.D. Cal. 1956) ("It is clear that the legislature intended to give exclusive meanings to each of the terms 'shares' and 'stocks' as used in § 6400, and it cannot be questioned that under the Savings and Loan Association's Law a marked distinction is made between 'withdrawable accumulative shares' and 'stock' . . . The shares here in question are not stock.")[1]

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[1]Although it is true that in *Marshall Savings and Association* v. *Henson,* 78 Ill. App. 2d 14, 222 NE2d 255 (1966), the Appellate Court of Illinois called holders of withdrawable capital accounts in a savings and loan association "shareholders" (Pet. Br. Note 13, pp. 20-21), the offhand remark of the court by no means constituted an adjudication of the matter.

Petitioners also cite *Bowman* v. *Armour and Co.,* 17 Ill. 2d 43, 160 NE2d 753 (1959), in support of their contention that withdrawable capital accounts are stock. This case is not on point, however, since the Illinois court was not there required to make a distinction between corporate stock and withdrawable savings accounts either

2. Withdrawable Accounts are not "Transferable Shares", "Investment Contracts", or "Certificates of Interest in a Profit Sharing Plan".

Petitioners and the SEC also contend that the withdrawable capital accounts of City Savings Association are securities under the 1934 Act because they are "transferable shares" or "investment contracts" or "certificates of interest or participation in any profit sharing agreement." (Pet. Br. pp. 21-23; SEC Br. pp. 11-13). Petitioners cite Loss, *Securities Regulation* (2d ed. 1961) for the proposition that these instruments include interests in fishing boats, automobile trailers, vending machines, cemetary lots, tung trees, vineyards, fig orchards, farmland, etc. Petitioners have failed to advise the Court, however, that Loss' statement is preceded by an explanation that these transactions were based upon "a purported sale or lease of some farm of tangible property subject to an arrangement whereby the seller retains possession and control of the property with a view to earning a profit for the nominal owners and lessees." Loss, *Securities Regulation*, 489-90 (2d ed. 1961). This significant characteristic distinguishes these transactions as well as the case of *SEC* v. *Los Angeles Trust, Deed and Mortgage Exchange*, 285 F.2d 162 (9th Cir. 1960) (SEC Br. Note 15 p. 21). Such transactions differ radically from a withdrawable capital account in a savings and loan association. In the first place, no *interest* in tangible property, personal or real, is transferred to a holder of a withdraw-

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generally or for the purposes of the Securities Exchange Act of 1934."

The case of *Gidwitz* v. *Lanzit Corrugated Box Company*, 20 Ill. 2d 208, 170 NE2d 131 (1960), which is also cited by the petitioners, is equally irrelevant. The court was not there considering any question pertaining to savings and loan associations or to withdrawable capital accounts.

able account. There is no "sale or lease" whereby the seller retains possession and control of the property. Secondly, the "property" transferred had itself a fluctuating market value, thereby giving a fluctuating value to the instruments representing interests in that specific property. Thus, the land involved in the tung tree plantation carried a variable price, and the investor in an interest in such a plantation was led to expect that this fluctuation in price would work to his benefit. By way of contrast, the underlying properties involved in savings and loan associations are merely loans, carrying a stated face value and rate of interest, to be repaid either in a lump sum or periodically. The loan is secured by a first mortgage of real estate. The association is not speculating on an increase in the value of the real estate and the withdrawable account cannot fluctuate in value. Thus the element of speculation, which is present in all transactions enumerated by Professor Loss, is not present in the savings and loan association withdrawable accounts.

Petitioners again cite several provisions of the Illinois Savings and Loan Act to show that withdrawable capital accounts have characteristics of certificates of interest in a profit sharing agreement, transferable shares, and investment contracts (Pet. Br. pp. 21-22). Once again, however, petitioners omit mentioning the many characteristics of withdrawable capital accounts that under the Illinois Savings and Loan Act distinguish these interests from certificates of interest in a profit sharing agreement, transferable shares, and investment contracts. Withdrawable accounts are not negotiable. *Ill. Rev. Stat.* ch. 32, §768 (b), (c) (1965). This prevents these interests from having a market in which they may be traded or in which speculation might occur. Withdrawable accounts may be issued in unlimited amounts. *Ill. Rev. Stat.* ch. 32, §728 (5) (1965).

This characteristic precludes the maintenance of a market for them. Withdrawable accounts are also fully matured and completely withdrawable at the time they are issued. *Ill. Rev. Stat.* ch. 32, §§762 (a) and 773 (a) (1965).

B. A Withdrawable Capital Account Is Not an "Instrument Commonly Known as a 'Security'."

The legislative history of the Securities Act of 1933, which defines a "security" in substantially the same way as does the 1934 Act, indicates that Congress intended the term "security" to mean those instruments usually thought of as securities. The Report accompanying the Securities Act of 1933 states:

> "Paragraph (1) defines the term 'security' in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the *ordinary* concept of a security.". H.R. Rep., No. 85, 73rd Cong., 1st sess. 2-4 (1933), p. 11. (Emphasis added.)

The chief characteristics of a withdrawable account as enumerated above on pages 7 and 8 show that these interests are very different from interests commonly known as securities. On the contrary, withdrawable accounts are most commonly thought of as akin to bank savings deposits.

The Illinois Legislature in creating withdrawable accounts in savings and loan associations, did not consider or intend such accounts to be securities. The Illinois Savings and Loan Act provides that:

> "Withdrawable capital certificates, account books, and any other evidences of membership shall be non-negotiable and not subject to Article 8 of the Uniform Commercial Code concerning investment securities." *Ill.Rev.Stats.*, ch. 32, §768 (c) (1965).

The statute specifically provides that permanent reserve shares are subject to Article 8 of the Uniform Commercial Code. *Ill. Rev. Stat.*, ch. 32, §768 (c) (1965).

While this statute may not be conclusive in determining whether withdrawable capital accounts are securities under Federal law, it does give a characteristic to withdrawable accounts which must be considered in determining whether they are similar to instruments commonly known as securities. In the face of such a statute, withdrawable capital accounts could never be "commonly known as a security" as required by the 1934 Act, 15 U.S.C. §78c (a) (10) (1965).

The preamble of the Securities Exchange Act of 1934 provides additional evidence of a Congressional intent to exclude withdrawable savings and loan accounts from its provisions. The Act was designed to regulate:

> "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets . . . (when) the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation resulting in sudden and unreasonable fluctuations in the prices of securities. . . ." Securities Exchange Act of 1934, §2, 15 U.S.C. §78b (1965).

This clear expression of Congressional intent indicates that the Act was designed to cover only those securities which are negotiable and for which a fluctuating market exists. Since a withdrawable account in an Illinois savings and loan association is by statute made non-negotiable, no fluctuating or other market exists for savings accounts, and they are not traded either on an exchange or on the over-the-counter market. Thus, to hold a withdrawable savings account to be a security would be to go beyond the purpose of the 1934 Act as expressed in its preamble.

An essential characteristic of a withdrawable account in a savings and loan association is its withdrawability and complete maturity from the moment of its creation. An investor is free to withdraw his investment at any time. The Illinois Savings and Loan Act specifically provides:

> "A holder of withdrawable capital may make application for withdrawal of, and the association may pay, all or any part of the withdrawal value thereof at any time." *Ill. Rev. Stats.*, ch. 32, §773 (a) (1965)[2]

The immediate withdrawability of accounts in a savings and loan association as well as their complete maturity at the time of their creation, compels the conclusion that the 1934 Act is not applicable to them, since no additional protection would be given to investors by application of the Act.

The intention of Congress to exclude withdrawable savings and loan accounts from the purview of the 1934 Act is further manifested by the express exclusion from the definition of a "security" of debtor-creditor relationships, represented by instruments such as notes which mature within nine months from the date of their insurance. Since a withdrawable capital account is fully withdrawable and thus mature at issue, *Ill. Rev. Stats.*, ch. 32, §762 (a) (1965), there is a close similarity between it and a debtor-creditor

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[2] The Illinois Savings and Loan Act at one time allowed an association to place limits on the amount which a holder of a withdrawable account could withdraw at one time. *Ill. Rev. Stats.*, ch. 32, §773 (b) (1965). However, any amounts deposited after such a limitation was placed in effect had to be fully withdrawable. *Ill. Rev. Stats.*, ch. 32, §773(h) (1963). Although City Savings Association did limit the amount which certain of its depositors could withdraw, none of the petitioners, all of whom deposited after such limitation was placed into effect, could legally be limited as to withdrawability of his account. This section was repealed in 1965.

relationship which matures within nine months from issue. Thus, these accounts fit within a category which Congress clearly exempted from the provisions of the Act. See *Harn* v. *Woodard,* 151 Ind. 132, 50 N.E. 33 (1898), which holds that the holder of a withdrawable account in a saving and loan association is in a debtor-creditor relationship with the association.

Petitioners contend that because of the wording of the exemption in the Illinois Securities Act, *Ill. Rev. Stat.,* ch. 121½, §137.3 (1965) Illinois recognizes that building and loan withdrawable capital accounts are securities. (Pet. Br. pp. 29-32) Petitioners' reasoning becomes valid only if it can be shown that the exemptions in Section 137.3 were intended to be definitional in character. Evidence that such was not the case can be found by reading sub-section I, J and L of the same exemption Section, which exempt real estate purchase contracts, notes secured by first mortgages, and negotiable notes, drafts and bankers acceptances arising out of current transactions. (The complete text of the exemptions, together with the definition of "security" under the Illinois Act, is set forth in the Appendix.) If read as petitioners would have us read this section, the absurd result would be that Congress declared those instruments enumerated in sub-sections I, J and L to be securities by "exempting" them, for in the absence of the exemption, no one could possibly contend that those instruments were "securities" within the meaning of that term as defined in §137.2-1. The only conclusion is that §137.3 was not intended to *define* what instruments are securities, but was intended to clarify what instruments were not subject to the Act, regardless of whether they were securities in the first instance under the definition of that term in Section 137.2-1.

The same can be said of petitioners' argument (Pet. Br. pp. 36-38) that the exemption from the registration provisions of Section 12 of the Securities Exchange Act of 1934 (added in 1964) indicates a Congressional intent to include withdrawable capital accounts within the definition of security found in Section 3(a) (10), 15 U.S.C. §78c(a) (10) (1965). As Professor Loss has stated, in discussing an analogous exemption, "it would be too facile to argue" that an exemption in an SEC rule for those real estate brokers who sell "no *securities* except shares of cooperative apartment corporations proves conclusively that such shares (cooperative apartment corporations) are securities under either the 1933 Act or the 1934 Act." *Loss, Securities Regulation,* 493-94 (2d ed. 1961). (Emphasis added.) Similarly, the exemption in Section 3(a) (8) of the Securities Act for "any insurance or endowment policy or annuity contract" although creating a negative implication that insurance policies *are* securities, which may be exempt from the registration requirement but are subject to the anti-fraud provision" [*Loss, Securities Regulation,* 497 (2d ed. 1961)] has been interpreted by the SEC as not implying that insurance contracts are securities. See Hearings before Subcom. of Senate Com. on Banking and Currency on S. 2408, 81st Cong., 2d Sess. 33 (1950); *Loss, Securities Regulation,* 497 (2d ed. 1961).[3] See also

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[3] The House Report on this section of the 1933 Act stated:

"Paragraph (8) makes clear what is already implied in the act, namely, that insurance policies are not to be regarded as securities subject to the provisions of the act. The insurance policy and like contracts are not regarded in the commercial world as securities offered to the public for investment purposes. The entire tenor of the act would lead, even without this specific exemption, to the exclusion of insurance policies from the provisions of the act, but the specific exemption is included to make misinterpretation impossible." H. Rep. 85, 73rd Cong., 1st Sess., p. 15 (1933).

SEC v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 74 n. 4 (1959) (concurring opinion). Similarly untenable is the argument that the exemption from the 1933 Act in Section 3(a) (5) for "any security" issued by a building and loan association proves that all building and loan share accounts are securities within the meaning of the definition Section, §2(1).

Petitioners also cite the Investment of Public Funds Act, *Ill. Rev. Stat.* ch. 102, §30 (1965), the State Treasurer Act, *Ill. Rev. Stat.* ch. 130, §41(a) (1965), and the Credit Union Act, *Ill. Rev. Stat.* ch. 32, §496.23 (1965) for the proposition that withdrawable capital accounts are securities under Illinois law (Pet. Br. pp. 32-33). These acts are plainly irrelevant to the issue at bar. When these acts were passed, the Illinois legislature did not at all consider the question in this case, and the sections cited by petitioners are not definitional in character.

The provisions of the Illinois Insurance Code, *Ill. Rev. Stat.* ch. 73, §§737.14(a), 792.1, and 953 (1965) and the Illinois Probate Act, *Ill. Rev. Stat.* ch. 3, §259(e) (1965) (Pet. Br. pp. 33-34) are irrelevant for these reasons also. Moreover, one of the provisions of the Illinois Insurance Code cited by petitioners does posit a distinction between shares and accounts or deposits in a savings and loan association. *Ill. Rev. Stat.* ch. 73, §737.14(a) (1965).

C. Congress Intended to Limit Federal Regulation of State Savings and Loan Associations.

One of the concerns of Congress in enacting legislation affecting financial institutions has been to preserve and maintain the dual system of banking in the United States. Thus, under the Federal Bankruptcy Act, state building and loan associations are exempt from federal bankruptcy

adjudication. 11 *U.S.C.* §22 (1965). The reason for this exemption is the fear of disrupting state administration and intruding into an area of state concern. The report of the House Judiciary Committee states this clearly:

> "Building and Loan Associations are of a peculiar nature, . . . functioning almost exclusively in local communities. The deposits received are from local depositors and the securities taken are local securities. Therefore, it seems the part of wisdom to leave the administration of these matters in the local courts." Rep. 98, 72d Congress, 1st Session, House Judiciary Committee; House Reports 2-659; as quoted with approval in *Security Building and Loan Association* v. *Spurlock,* 65 F. 2d 768, 771 (9th Cir. 1933).

The report of the Senate Judiciary Committee on the bill concurs as to the policy behind the exemption for building and loan associations:

> "The purpose of it is to make clear that building and loan associations do not come within the provisions of the bankruptcy act. . . . This amendment puts the building [and] loan [associations] in the same class with municipal, railroad, insurance and banking corporations." Senate Reports, 2-574, 72d Congress, 1st Session as quoted in *Security Building and Loan Association* v. *Spurlock,* 65 F.2d 768, 771 (9th Cir. 1933).

Since City Savings Association derives its existence and powers from the Illinois Savings and Loan Act, it would be exempt from the provision of the Bankruptcy Act. *Home Savings and Loan Association* v. *Plass,* 57 F.2d 117 (9th Cir. 1932). The intention of Congress is to leave the regulation of these associations up to the states.

In 1966, when the powers of the Federal Savings and Loan Insurance Corporation were greatly broadened, Congress was careful to preserve the role of the states in regulating local financial institutions. After providing

that any civil suit to which the FSLIC shall be a party shall be deemed to arise under the laws of the United States, the following proviso was added:

> "Provided, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States." 12 U.S.C.A. §1730 (k) (l) (1965).

The legislative history of this Act shows that this proviso was added because of the concern of Congress about the effect of the bill on the dual banking system of the United States. The Senate Report states as follows:

> "In addition to the protection against arbitrary and oppressive action which this provides for the benefit of the institutions and individuals affected, this provision constitutes a significant recognition in Federal statutes of the importance of the powers and responsibilities of the State supervisory authorities in our dual financial systems."
>
> "The committee considers that the bill emphasizes the role of the state chartering and supervisory authorities, and in no way lessens the status of these State authorities." 10 *U.S. Code Cong. and Ad.* News 4284-4285 (1966).

In his concurring opinion in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959), Mr. Justice Brennan pointed out that when it can be found that Congress has left substantial responsibility for regulation to the states and that the regulatory functions assigned to the federal government cannot be accomplished by holding the interests involved to be securities, then the Securities Act should not apply. As is the case with insurance com-

panies, the State of Illinois assumes a major role in the regulation of the operation of savings and loan associations.[4] There is thus no need for additional federal regulation.

Were savings and loan withdrawable capital accounts held to be "securities", the regulation and administration of savings and loan associations would almost inevitably become a matter of Federal jurisdiction. In a proper case, the liquidation of insolvent savings and loan associations through Federal equity receiverships would follow, despite the clear expression of Congressional intent to the contrary. This has been the case with the liquidation of securities brokers. *SEC* v. *H. S. Simmons and Company*, 190 F. Supp. 432 (S.D.N.Y. 1961). A motion for the appointment of a receiver for the assets of City Savings was made in the trial court below. After the matter had been exhaustively briefed, the court below denied the motion. It is respectfully submitted that not until the application

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[4] For example, in Illinois the investments made by a savings and loan association are strictly limited by statute. *Ill. Rev. Stat.*, ch. 32, §§791 through 804 (1965). Directors or officers who knowingly make or plan an unauthorized investment are individually liable for all consequential damages to the depositors. *Ill. Rev. Stat.*, ch. 32, §902 (1965). The Commissioner of Savings and Loan Associations is given supervisory power over state chartered savings and loan associations. He is required to cause a surprise examination of every association annually and is empowered to compel compliance with recommended corrective measures. *Ill. Rev. Stat.*, ch. 32, §842 (1965) Under certain circumstances, the Commissioner is empowered to take custody of any association which has refused to take corrective action or which has impaired its withdrawable capital or which is being conducted in a fraudulent, illegal or unsafe manner. *Ill. Rev. Stat.*, ch. 32, §848 (1965). The Commissioner does not relinquish custody until the causes for his taking custody have been removed. *Ill. Rev. Stat.*, ch. 32, §854 (1965).

was made for the appointment of a receiver did the trial court below realize fully the ramifications of holding withdrawable capital accounts to be securities, and the extent to which such a holding would frustrate the will of Congress, expressed in the Bankruptcy Act and elsewhere, that savings and loan associations be administered under local law. This led to the inclusion in the order denying the appointment of a receiver of language authorizing the interlocutory appeal on the question of the applicability of the Securities Exchange Act of 1934 to these accounts.

D. Congress Has Vested Federal Regulation of State Savings and Loan Associations in the Federal Home Loan Bank Board.

The SEC seems to believe that the decision of the Court of Appeals in this case precludes federal regulation of the savings and loan industry and leaves the holders of withdrawable capital accounts unprotected. This is untrue. In stressing the need for regulating powers, the Commission ignores the elaborate scheme created by Congress to have the Federal Home Loan Bank Board perform this very function on the Federal level. (National Housing Act Title IV, §402(a) et seq.) 12 U.S.C. §1701 et seq. (1965). As of August 1, 1967, assets of all savings and loan associations in this country totaled $138 billion dollars. Associations whose accounts were federally insured had assets of $134,000,000,000. Uninsured associations had assets representing approximately 2.9% of the total.

The Federal Home Loan Bank Board directs a major regulatory agency with hundreds of employees including accountants, economists, and attorneys in the District of Columbia and in twelve regional districts throughout the country.

Congress gave the Board broad discretionary powers in terminating insurance of insured institutions or in prohibiting unsafe practices through cease and desist orders. This power may be exercised by the Board "whenever [in its opinion] any insured institution has violated its duty as such or is engaging or has engaged in an unsafe or unsound practice in conducting the business of such institution, or is in an unsafe or unsound condition to continue operations as an insured institution, or is violating or has violated applicable law, rule, regulation, or order, or any condition imposed in writing by the Corporation in connection with the granting of any application or other request by the institution, or any written agreement entered into with the Corporation, . . ." 12 U.S.C. §1730(b)(1) (1965).

In 1966, Congress gave the Board broad cease and desist powers and authorized it to remove or suspend directors and officers of insured institutions.

The Board is authorized to act as conservator or receiver of an insured state institution. The Board, if not receiver, may bid for the assets of the insured institution in default.

It is easily seen that Congress could not have intended that the Securities Exchange Commission should have jurisdiction over precisely the same matters. A contrary view would require an argument that Congress intended a meaningless clash of regulatory orders and actions.

E. Congress Intended to Regulate Only Those Instruments Which Have a Fluctuating Value and Which Are Traded on a Market.

Congress clearly and unequivocally stated its intent in Section 2 of the Act, which "section contains a general declaration of the purposes and objects of the bill." S.

Rep. No. 792, 73d Cong., 2d Sess., p. 14 (1932). (The entire text of Section 2 is set forth in the Appendix to this brief.) As a reading of this Section clearly reveals, Congress intended that only those securities which are negotiable and for which a fluctuating market exists should be subject to the provisions of the Securities Exchange Act of 1934.

Second, the historical context in which this legislation was enacted furnishes further evidence of the intent of Congress. As the Supreme Court has stated, "Courts in construing a statute, may with propriety recur to the history of the times when it was passed." *Great Northern Railway Co.* v. *United States,* 315 U.S. 262, 273 (1942). As reflected in §2 of the Act, the great crash of 1929, and the ensuing damage to the national economy, attributed by many to excessive speculation in securities with great fluctuation in the prices of securities, led Congress to enact this remedial legislation. Congress obviously was concerned with speculation in securities markets, whether conducted on national securities exchanges, or conducted in over-the-counter markets throughout the country. As stated in *SEC* v. *C. M. Joiner Leasing Corp.,* 320 U.S. 344, 351 (1943):

> "In the Securities Act the term 'security' was defined to include by name or description many documents in which there is *common trading for speculation or investment.*" (Emphasis added.)

The House Committee on Interstate and Foreign Commerce also recognized the purpose of the 1934 Act:

> "The statute provides for disclosure of information concerning securities listed on exchanges and for the regulation of *trading* in securities on exchanges and over-the-counter markets." H.R. Rep. No. 1418, 88th Cong., 2d Sess., 1964 U.S. Code Cong. & Ad. News at p. 3016. (Emphasis added.)

Whether Congress intended to subject withdrawable capital accounts to the Securities Exchange Act of 1934 can only be determined by examining the policy of that statute as compared with the characteristics of the withdrawable capital account. The chief characteristic of the account is its complete withdrawability. The holder of the account is free to obtain full payment at any time upon demand. All of the accounts issued to members of the class purportedly represented by petitioners enjoyed complete withdrawability of their accounts. The section of the Illinois Savings and Loan Act under which petitioners made their deposits provides:

> "An association while operating under this Section may accept additional withdrawable capital from its present shareholders as well as accept new withdrawable capital accounts and such withdrawable capital accounts shall not be subject to the provisions of subsection (b) of this Section, but shall be subject to withdrawal at will so long as the association is operating under the provisions of sub-section (b) of this Section." Illinois Savings and Loan Act, §4-14(h), *Ill. Rev. Stat.* Ch. 32, §773(h) (1963).

To avoid this argument, petitioners contend that the complaint alleges that their withdrawable capital accounts were on a limited withdrawal basis, in violation of this statute. Their complaint does not support their contention. More importantly, any such limitations were invalid, and petitioners' accounts were completely withdrawable in full. Any restrictions placed upon withdrawability would have violated the public policy expressed in the statute, would have been beyond the power of the directors to impose, and would have been completely void and of no effect. This is made abundantly clear in the case of *Latimer v. Equitable Loan and Investment Company*, 81 F. 776 (W.D. Mo. 1897), where the court stated:

> "[A]ny contract by which the owner of corporate stock deprives himself of important rights secured to him by the statute, and which he acquires by virtue of his ownership of the stock under the statute, is void. . . . The statutory right of ending a stockholder's relation to a loan and building association, by withdrawal therefrom is a fundamental right, evidencing a public policy, which cannot be waived or contracted away by any one or more members of such association . . ." 81 F. at 780-82.

Again this is an issue of law, not fact, and accordingly is not admitted by a motion to dismiss. *Weeks* v. *Denver Tramway Corp.*, 108 F.2d 509 (10th Cir. 1939).

Withdrawable capital accounts are not traded either on exchanges or through the over-the-counter market and are thus outside the scope of intended Congressional regulation.

II.

THE SEC HAS NOT CONSIDERED WITHDRAWABLE CAPITAL ACCOUNTS AS SECURITIES UNDER THE 1934 ACT.

The legislative history of the 1964 amendments to the 1934 Act cited by the SEC (SEC Br. p. 25) shows that the SEC has always looked at withdrawable savings accounts as deposits in banks and therefore not subject to the Act. The SEC has further viewed such interests in the same light as insurance policies, which are clearly not securities under either the 1933 or 1934 Acts. (See Loss, Securities Regulation 497 (2d ed. 1961), and discussion at p. 18, *infra*). Mr. William L. Cary, then Chairman of the SEC testified as follows:

> "With respect to savings and loan associations, an effort is made to treat them in essentially the same

manner as insurance companies are treated, that is, mutual savings and loan associations will be exempt, just as mutual insurance companies are:

"In the case of stock savings and loan associations, the stock, if purchased and traded as an equity investment, is subject to H.R. 6789 just as is stock of insurance companies.

"On the other hand, savings accounts in savings and loan associations are not subject to the bill, just as insurance policies are not covered. Because of the fact that most savings and loan associations issue so-called shares, which in fact merely evidence the existence of a savings account, special provision had to be made in proposed section 12(g) (2) (C) of the bill to exempt that type of 'share.'" Testimony of William L. Cary, Hearings on H.R. 6789, H.R. 6793, and S. 1642 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., p. 1213, (1963).

Further evidence that the SEC has not considered withdrawable capital accounts securities is the fact that the SEC did not deal with them at all in its comprehensive Special Study of the Securities Markets, completed in 1963.

The case and rulings cited by the SEC for the proposition that the Commission has held withdrawable capital accounts to be securities under the 1934 Act are wholly inapplicable. The case of *Archer* v. *SEC*, 133 F2d 795 (8th Cir. 1943) cert. denied 319 U.S. 767 (1944) involved more than savings and loan association "certificates"; the court's holding that section 17(a) of the 1933 Act and section 15(c)(1) of the 1934 Act had been violated was also based on fraudulent sales of common stock. Moreover, there is no indication that the court in that case was presented with the question of whether withdrawable sav-

ings accounts are securities. Obviously, the court never intended to deal with that question.

III.

PRIOR COURT DECISIONS COMPEL THE CONCLUSION THAT A WITHDRAWABLE CAPITAL ACCOUNT IS NOT A SECURITY.

This Court has not decided the question of what constitutes a "security" within the meaning of that term as defined in the Securities Exchange Act of 1934. However, it has decided questions under the Securities Act of 1933, which presumably give guidelines for resolving the question presented by this case. In discussing whether assignments of oil leases were securities under the 1933 Act this Court stated: "... In the Securities Act the term 'security' was defined to include by name or description many documents in which there is *common trading for speculation or investment.*" *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 351 (1943) (Emphasis added.) In *SEC* v. *W. J. Howey Co.*, 328 U.S. 293, 301 (1946), this Court stated its view of the law in this area even more clearly: "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."

There are three requirements, therefore, for an instrument to be a security within the 1934 Act: (1) There must be an investment of money in a common enterprise; (2) there must be profits derived solely from the efforts of others; and (3) there must be common trading for speculation or investment. All of these elements are missing from the withdrawable capital accounts of savings and loan associations.

In the first place, a deposit in a withdrawable savings account is not an investment but actually creates a debtor-creditor relationship. *Harn* v. *Woodard,* 151 Ind. 132, 50 N.E. 33 (1898). The depositor loans his money to the association with the knowledge that it is withdrawable at will and in the expectation that his deposit will earn interest. While the Illinois courts have not definitely adjudicated this relationship, numerous other jurisdictions confirm that the relationship is one of debtor and creditor. See *In re Krueger's Estate,* 180 Wash. 165, 39 P.2d 381, 383 (1934); *Bell* v. *Bakerstown Savings Assn.,* 385 Pa. 158, 122 A.2d 411, 413 (1956); *Rummens* v. *Home Savings Assn.,* 182 Wash. 539, 47 P.2d 845, 846 (1935). Thus the relationship in the instant case is more closely analogous to one of debtor-creditor and *not* one of investment. The Court below correctly found that the "investment in a common enterprise" test of this Court was not met. *Tcherepnin* v. *Knight,* 371 F.2d 374, 377 (7th Cir. 1967).

In the second place, profit is not derived "solely from the efforts of others." Money that is deposited is loaned to other members of the savings and loan association. Depositors and borrowers must be members of the association. *Ill. Rev. Stat.,* ch. 32, §741 (1965). Thus, the profits of the enterprise result from the activities of members among themselves. Outsiders do not have any but the smallest dealings with the association. The Court below expressly recognized the failure of withdrawable capital accounts to meet this test. *Tcherepnin* v. *Knight,* 371 F.2d 374, 377 (7th Cir. 1967).

Finally, the *Joiner* case sets up the requirement that there be common trading for speculation or investment for an instrument to be a security. Because of the non-negotiable character and fixed-amount obligation of withdrawable ac-

counts, there is no common trading for speculation or investment in the withdrawable capital accounts of City Savings Association.

This fundamental requirement of trading in interests having a fluctuatory value was recognized in *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959). There, variable annuity contracts, whose return was not fixed but whose return was measured by the success or failure of the investment policy of the annuity company, were held to be securities. As Mr. Justice Brennan emphasized in his concurring opinion, Congress intended to regulate only those interests which had a fluctuating value and whose return to the investor was measured by the success or failure of the investment company's experience.

This characteristic of a security was again recognized in *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967). There, this Court held a "Flexible Fund Annuity" to be a security which cannot be offered to the public without conformity to the registration requirements of Section 5 of the 1933 Act. This Court emphasized that this instrument is a security because its appeal to the purchaser is on the basis of "growth", not of stability and security. (387 U.S. 202, 211). It is evident that to depositors in a savings and loan association, withdrawable capital accounts represent not so much growth as stability and security.

Of course, petitioners here are bearing the risk of insolvency of the Association. However, as Mr. Justice Brennan pointed out, the Federal Securities Acts are not designed to protect against this risk:

> "Even more unpersuasive is the respondents' argument that even in a traditional annuity the policyholder bears the investment risk in the sense that he stands the risk of the company's insolvency. The prevention of insolvency and the maintenance of 'sound' financial

condition in terms of fixed-dollar obligations is precisely what traditional state regulation is aimed at." *SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 90-91 (1959).

And as further pointed out by Mr. Justice Harlan in his dissenting opinion in the *Variable Annuity* case, savings bank deposits were equated by Congress with insurance policies and neither were intended to be subject to the Securities Exchange Act of 1934. (359 U.S. at 98-99.)

IV.

A HOLDING THAT WITHDRAWABLE SAVINGS ACCOUNTS ARE "SECURITIES" WOULD SECURE FOR PETITIONERS A PREFERENCE TO THE ASSETS OF CITY SAVINGS ASSOCIATION AND WOULD DISCRIMINATE AGAINST OTHER HOLDERS OF WITHDRAWABLE ACCOUNTS IN THE ASSOCIATION.

In the case at bar, petitioners purport to represent a class composed of persons who made deposits in City Savings Association after July 23, 1959. Petitioners exclude from this class all the many depositors who opened accounts in City Savings Association prior to this time. The accounts of nearly all of these prior depositors had been placed on a limited withdrawability basis. Prior to July 9, 1959, an association whose accounts had been placed on a limited withdrawability basis could not accept new deposits. However, by an Act which became effective on July 9, 1959 such an association could accept new deposits provided that no limitation as to withdrawability would be placed on such new deposits. *Ill. Rev. Stat.*, ch. 32 §773(h) (1963). (Effective August 1, 1965, the Illinois General Assembly repealed this section.) All of the persons pur-

portedly represented by petitioners made their deposits under this act, and thus all of petitioners' accounts were fully withdrawable. Petitioners seek to have their deposits declared void, to be declared creditors of the Association, and to enjoin the payment of any liquidation proceeds to pre-July 23, 1959 depositors until after petitioners have been repaid in full. The purpose of labeling as "securities" petitioners' accounts, while refusing to classify accounts opened prior to July 23, 1959 as securities, is to give petitioners a priority over the other depositors in the association solely because of the time when the deposits were made.

This issue as to the applicability of the Securities and Exchange Act of 1934 raised by petitioners could arise only in a situation where a preference in liquidation of an uninsured savings and loan association is claimed. If the 1934 Act were to apply, the statute of limitations under the 1934 Act would apply also. This provides that actions under the 1934 Act must be brought within three years after the accrual of the cause of action and within one year of the discovery of the facts constituting the cause of action. 15 U.S.C. §78cc(b) (1965). Thus in every case of the liquidation of an uninsured savings and loan association, there would be a danger that the more recent depositors could obtain a preference over the earlier depositors, if withdrawable savings accounts are held to be securities.

No justification exists for the granting of such a preference in this case or indeed in any case. This alone compels the conclusion that Congress did not intend that a withdrawable savings account should be a security.

CONCLUSION

For the reasons stated above, these Respondents respectfully pray that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

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Securities Exchange Act of 1934, §2, 48 Stat. 881, 15 U.S.C. §78(b) (1964):

"For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.

"(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located, and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

"(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the

amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

"(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

"(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit." Securities Exchange Act of 1934, §2, 15 U.S.C. §78(b (1964).[1]

The Illinois Securities Law of 1953, §2.1, Ill. Rev. Stat. Ch. 121½, §137.2-1 (1965):

"'Security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, investment fund share, face-amount certifi-

cate, voting-trust certificate, fractional undivided interest in oil, gas or other mineral lease, right, or royalty or, in general, any interest or instrument commonly known as a security, or any certificate of deposit for, certificate of interest or participation in, temporary, or interim certificate for receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

Illinois Securities Law of 1953, §3, Ill. Rev. Stat. Ch. 121½, §137.3:

Exempt securities: The provisions of Sections 5 and 7 of this Act shall not apply to any of the following securities;

* * *

"I. Instruments evidencing indebtedness under an agreement for the acquisition of property under contract of conditional sale;

"J. A note secured by a first mortgage upon tangible personal or real property when such mortgage is made, assigned, sold, transferred and delivered with such note or other written obligation secured by such mortgage, either to or for the benefit of the purchaser or lender; or bonds or notes not more than 10 in number secured by a first mortgage upon the title in fee simple to real property if the aggregate principal amount secured by such mortgage does not exceed $50,000 and also does not exceed 75% of the fair market value of such real property;

* * *

"L. Negotiable promissory notes and drafts, bills of exchange and bankers' acceptances which arise out of current transactions or the proceeds of which have been or are to be used for such current transactions, but only if such notes, drafts, bills or acceptances have a maturity at the time of issuance of not to exceed 9 months; and any renewal or renewals, the maturity of each of which is similarly limited, of such notes, drafts, bills or acceptances;"